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No. 07-463

In The Supreme Court of the United States

PRISCILLA SUMMERS, et al.,

Petitioners,

v.

EARTH ISLAND INSTITUTE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF STATE OF CALIFORNIA EX REL. EDMUND G. BROWN JR., ATTORNEY GENERAL, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. 215.4(a) and 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review.

2. Whether respondents established standing to bring this suit.

3. Whether respondents' facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

4. Whether the court of appeals erred in affirming the nationwide injunction issued by the district court.

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IDENTITY AND INTEREST OF AMICUS CURIAE

In this case, the United States seeks a procedural ruling to shield from judicial review certain rules that bar the public's participation in federal management decisions affecting national forests. These rules, which have worked to foreclose all public review, comment and appeal of certain timber sales and logging projects, were invalidated on the merits by the lower courts in this case. The United States does not ask the Court to review the validity of the rules, but instead seeks to keep the entire controversy out of court by claiming that a challenge to the rules is not justiciable. If the Court were to adopt the view advanced by the United States, it would radically alter its long-standing jurisprudence on justiciability, ripeness and standing, and would nullify the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*., the primary mechanism for seeking to redress improper and illegal federal agency actions.

The State of California has a long history of participation in federal action that affects the State's interest, and in particular is a frequent participant in national forest management in California. For over twenty years, California Attorneys General have commented on, and appealed, intervened and challenged scores of Forest Service decisions affecting the management of public lands within the State's borders. Our interest in forest planning reflects the importance of national forests and forest resources to

the people of California. National forests cover millions of acres of land in California, including some of the most spectacular and sensitive areas of the State. For example, the Sequoia National Forest contains world-renowned groves of Giant Sequoia trees; areas within the Tahoe National Forest rank among the best and most important freshwater fishing areas in the country; the Inyo National Forest is among the country's most used forests; and the eleven national forests in the Sierra Nevada mountain range provide habitat for many imperiled species and a significant portion of the State's drinking and agricultural water supplies.

Should the Court adopt the restrictive views of ripeness and standing advocated by the United States, additional and unwarranted barriers would be placed upon the ability of the public to obtain review and redress from decisions of the Forest Service, as well as other federal agency action currently reviewable under the APA. The State of California, respectfully requests that the Court find the challenge in this case justiciable, and thereby preserve the public's right to judicial review of a wide range of federal agency regulations.

SUMMARY OF ARGUMENT

The United States seeks to insulate from judicial review two final United States Forest Service regulations that relieve the agency of its obligation, under the 1992 Forest Service Decisionmaking and Appeals Reform Act ("ARA"), Pub. L. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note), to provide public notice of, and the opportunity to comment upon and appeal, actions to implement national forest management plans. The rules exempt certain categories of projects and management activities from the ARA's notice, comment and appeal provisions. The exempted categories include, among other things, certain types of timber sales and salvage logging projects that are already exempt from public review under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. The Forest Service has fully implemented the rules, approving numerous projects in California and elsewhere without any of the procedural protections afforded by the ARA, impairing members of the public, including Respondents, from participating in decisionmaking that affects the national forests that they use, study and enjoy.

The Administrative Procedure Act allows for judicial review of duly promulgated final agency rules where a plaintiff shows he or she has been "adversely affected or aggrieved," within the meaning of a relevant statute, by application of the rules and there is no other adequate remedy in a court. The ripeness doctrine requires a showing that the rules have had concrete effect on the plaintiff's interests, that they

are otherwise fit for review, and that hardship to the plaintiff would ensue if review is withheld. In this case, the United States argues for a departure from existing law, claiming that facial review of an agency rule is not available at all under the APA, unless the rule commands immediate changes in behavior backed by serious penalties for failure to comply. A showing that plaintiff faces an enforcement "dilemma," however, is only necessary under existing law when the plaintiff seeks to challenge an agency rule before the agency has acted to enforce or apply it. There is no support for the United States' attempt to graft requirements previously applied only to pre-enforcement review, onto the general requirements for judicial review of agency action under the APA. To do so would undercut the Court's broad reading of the APA's judicial review provisions, and the presumption of judicial review embodied in the statute itself.

Respondents' challenge to the rules is justiciable and ripe for review. The rules are final and have been fully implemented, numerous projects have been approved under the rules, and particular applications of the rules have adversely affected Respondents and others. The application of the rules is clear, and not subject to further agency development or adjudication. The conflict between the rules and the ARA is "purely legal," and relief cannot be obtained in any other manner. A finding of hardship is justified because the rules prevent Respondents from obtaining sufficient information about certain project proposals until after they are already approved and

implemented, making it difficult to ascertain when agency action is taken in violation of the ARA.

Respondents have standing to challenge the rules because they show injury in fact due to Forest Service implementation of the rules. The agency's application of the rules in specific instances has diminished Respondents' ability to engage in, influence, or even be informed about Forest Service plans for resource management in national forests that they personally use and enjoy on a regular basis. Respondents can no longer monitor and comment on Forest Service activities that fall within the rules, or even obtain full information about project proposals until after they are already approved and implemented. As a result of the rules, Respondents suffered harm not just to their interest in participating in Forest Service decision-making in the manner contemplated by the ARA, but also tied that harm to their personal stake in particular national forests.

Restricting judicial review in the various manners advanced by the United States would allow an agency to defeat judicial review of a challenged rule simply by unilaterally deciding to withdraw any challenged project-specific decision made under the rule. This is precisely the outcome sought by the Forest Service in this case. Adoption of this view would eliminate facial review of whole classes of non-penalizing federal rules that affect, diminish or eliminate rights or interests created by statute. Such an outcome is particularly egregious where, as here,

the rules that the Forest Service seeks to shield from judicial review are themselves designed to restrict public participation. Without facial review, the rules will stand, denying over and over the opportunity of citizens to submit their views regarding the management of some of the most important of our public lands.

ARGUMENT

I. Judicial Review of Final Agency Rules Is Available Under the APA to Any Person "Adversely Affected or Aggrieved" by the Rules

The APA subjects to judicial review both "agency action made reviewable by statute" and "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The meaning of "agency action" includes "the whole or a part of an agency rule." *Id*. § 551(13). Final agency regulations are "final agency action" under the APA. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 151 (1967) (*Abbott*); *see also Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967) (a regulation "promulgated in a formal manner after notice and evaluation of submitted comments – is a 'final agency action' . . . "). Any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" is entitled to judicial review of that action. 5 U.S.C. § 702. The APA embodies the "basic presumption of judicial review" to those who meet these requirements. *Reno v. Catholic Social Svcs*., 509 U.S. 43,

56-57 (1993). The statute "manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA]'s generous review provisions must be given a hospitable interpretation." *Abbott*, 387 U.S. at 140-141 (quotations, citations and footnote omitted).

Congress enacted the ARA in 1992, in response to Forest Service attempts to restrict public participation in its planning activities. Confronted with yet another proposal to categorically exclude certain Forest Service decisions from administrative appeal, Congress acted in part to preserve the scope of the administrative appeals process as it then existed. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 691, 698 (9th Cir. 2007).[1] The Act requires the Forest Service to "establish a notice and comment process for proposed actions of the Forest Service concerning projects that implement land and resource management plans," and activities and a "procedure for appeals of decisions concerning such projects." ARA § 322(a). Those who participate in the public comment process may appeal an adverse decision. *Id*. § 322(c). These provisions reflect Congressional intent to "allow for continued citizens' rights to participate in, and appeal decisions of, the Forest Service while providing for more timely consideration of such

[1] This aspect of the holding below on the merits, assessing the purpose and meaning of the ARA, is not challenged by Petitioners.

appeals." 138 Cong. Rec. H9870-02 (Sept. 30, 1992) (Conf. Report). The Forest Service subsequently promulgated the rules at issue here, exempting projects that fall within a categorical exclusion under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*., from the public notice, comment, and administrative appeal provisions of the ARA. 36 C.F.R. 215.4(a), 215.12(f) (2003).

The United States argues that these Forest Service rules are not subject to judicial review under the APA, even though the rules have been fully implemented and applied so as to prevent members of the public, such as Respondents, from participating in Forest Service decision-making in the manner envisioned by the ARA, and that exclusion threatens their enjoyment of specific national forests that they visit and use on a regular basis. In support of its view, the United States argues that a facial challenge to a final rule is not justiciable under the APA *unless* the rule requires a person to immediately alter his "primary" conduct or risk serious penalties for noncompliance. If a plaintiff does not show that an allegedly unlawful rule creates such a "dilemma," and no other statute provides for judicial review of the rule, the United States maintains that review is available only through an as-applied challenge to a particular decision made under the rule. Pet. Br. 16-17 and n. 5. Alternatively, the United States argues that because judicial review can be obtained through an as-applied challenge, that is an "adequate remedy" for any harm occasioned by the rule. Pet. Br. 20-21, 24-25.

The Court has never endorsed any of these restrictive readings of the scope of judicial review under the APA, or under the Court's ripeness jurisprudence. Each of the restrictive readings of the APA and ripeness caselaw would work to diminish the availability of judicial review of a wide range of federal agency actions, particularly those that restrict public participation opportunities afforded by statute. The Court recognizes, however, that the APA permits review of final agency rules that impinge upon statutory interests, when the rules have been implemented so as to inflict actual harm. *Abbott*, 387 U.S. at 149, 150; *see also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 738-739 (1998).

A. The "Dilemma" Found to Justify Judicial Review in *Abbott* Applies Only When Review Is Sought Prior to Enforcement or Implementation of the Challenged Rule

The "dilemma" that the United States claims is essential for judicial review of a final agency rule is derived from the Court's holding in *Abbott.* There, the Court held that an action for pre-enforcement relief from prescription drug labeling rules was ripe for review because the rules required regulated entities to choose between undertaking significant expense to change their labels or risking "serious criminal and civil penalties." *Abbott*, 387 U.S. at 152-153. Thus the rules alone, without enforcement or further implementation, were found to cause actual harm to the plaintiffs. *Id*. at 153. Similarly, in *Gardner v. Toilet*

Goods Ass'n, 387 U.S. 167 (1967), cosmetics manufacturers obtained pre-enforcement review of rules requiring a change in manufacturing processes, because the rules presented them with a comparable costly dilemma. *Id*. at 172-173. A challenge to a National Park Service regulation defining certain concession contracts as falling outside of the Contract Disputes Act was not ripe for pre-implementation review, however, because the mere existence of the rule, without more, did not cause any "immediate harm." *National Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 810 (2003).

Each of these actions was in a posture distinct from this case, because they were filed prior to enforcement or application of the challenged rule to plaintiffs' circumstances. In that situation, actual harm could not be traced to application of the challenged rule, but had to be tied to the existence of the rule alone. *Cf. Ohio Forestry,* 523 U.S. at 733-734 (no pre-implementation review of forest management plan because existence of plan alone did not cause any actual harm).

Consistent with the presumption of judicial review under the APA, *see, e.g., Reno,* 509 U.S. at 56-57, this Court has never interpreted the APA's "adversely affected" requirement to mean that, to be challenged on its face, a rule *must* create the dilemma that the United States claims is necessary for judicial review. Nor has the Court restricted judicial review to only those rules that affect some undefined subset of "primary" conduct, or any particular sort of conduct.

Rather, the Court has "said that to be 'adversely affected or aggrieved within the meaning' of a statute, the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Federation,* 497 U.S. 871, 883 (1990) (*NWF*) (citation omitted). The Court has not required that the harm shown be of any particular type in order to meet these requirements under § 702 of the APA.

The United States misreads *Abbott* and *Gardner* as holding that judicial review under the APA is available *only* for rules that command changes in regulated behavior backed by serious penalties, whereas the Court held that this scenario simply suffices to show that a plaintiff has been "adversely affected or aggrieved" when a rule is challenged *in advance of* any enforcement or application of the rule. *See Gardner*, 387 U.S. at 171; *see also Abbott,* 387 U.S. at 150 ("Such regulations have the force of law before their sanctions are invoked as well as after.").

Where, as here, final agency rules already have been implemented and applied in particular circumstances, determining whether the plaintiff has been "adversely affected or aggrieved" does not depend upon whether or not the rules themselves, in a pre-enforcement posture, impose the sort of harm that is required to justify review prior to enforcement or application of the rule.

Outside of the pre-enforcement context, the Court never has held that a regulation *must* force a choice between compliance and the risk of penalties in order to meet the "adversely affected or aggrieved" requirement of the APA, or to demonstrate that its effects are felt in a concrete way for purposes of ripeness. In holding that plaintiffs failed to show concrete harm from the Bureau of Land Management's challenged actions in *NWF*, the Court explained that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, *by some concrete action applying the regulation* to the claimant's situation in a fashion that harms or threatens to harm him." *NWF*, 497 U.S. at 891 (emphasis added). The Court referred to "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately," prior to any agency application of the rule, as a "major exception" to the general requirement that agency rules be applied so as to inflict harm, or the threat of harm, before being subject to judicial review. *Ibid*.

NWF concerned an action similar in posture to this case, in that it was brought *after* the defendant agency had already made decisions under certain policies that were alleged to comprise the challenged "land withdrawal review program." 497 U.S. at 885-886. Although the Court declined to review the allegedly unlawful program because it was not final

agency action within the meaning of the APA, plaintiffs also failed to show that their interests were "adversely affected or aggrieved." *Id.* at 889, 892-893. Plaintiffs had claimed only to use and enjoy land *in the vicinity* of lands affected by the program, and the environmentally harmful activities that plaintiffs feared already occurred *in the vicinity* of such lands. *Id.* at 887, 889. There was no way to tell from plaintiffs' allegations whether they would suffer actual harm as a result of the challenged land withdrawal program, *id.* at 889, and before any mining could occur further agency action was required. *Id*. at 893 and n. 3. Whether or not the program forced plaintiffs to choose between compliance or the risk of serious penalties was not discussed because it was not relevant.

In sum, the APA permits review of final agency rules that harm statutory interests when the rules have been implemented so as to inflict actual harm. *See Abbott*, 387 U.S. at 150; *NWF*, 497 U.S. at 883. The conditions required for pre-enforcement review of agency rules are not applicable when agency implementation of the rules causes actual harm. Outside of the pre-enforcement context, however, the Court has never imposed any condition that the rules present plaintiffs with the dilemma of choosing between compliance or the risk of enforcement, in order to obtain facial review of final agency rules. *Id.* at 882-883. Because Respondents in this case can demonstrate actual harm to their statutory and recreational interests due directly to agency application of the

rules, standards governing the availability of pre-enforcement review have nothing to do with this case.

B. Judicial Review of Final Agency Rules Under the APA Does Not Require a "Special Review Statute"

The United States next argues that, when no *Abbott*-type dilemma exists, facial review of final agency rules is available only if a "special statutory provision authoriz[es] direct review" of the specified regulations. Pet. Br. at 16-17. This interpretation is not supported by the grant of judicial review in § 704. According to the United States, a facial challenge to a final agency rule is possible under the APA only if the rule causes harm in the pre-enforcement context (as in *Abbott*), or a statute *other than* the APA provides for review. This view finds no support in the APA's language or intent, and was rejected by the Court long ago. *See NWF*, 497 U.S. at 883 ("We have long since rejected that interpretation, however, which would have made the judicial review provision of the APA no more than a restatement of pre-existing law."); *Abbott*, 387 U.S. at 142 (legislative history of the APA clearly indicates Congress intended to preserve "traditional channels of review").

The APA provides for judicial review in every case where fully adequate relief cannot be obtained through another statutory mechanism or review has not been withheld by clearly expressed intent of

Congress. *Abbott*, 387 U.S. 140-141; *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 160 (1967). As this Court has long recognized, it was the intent of Congress that the APA "cover a broad spectrum of administrative actions," and that it codify existing judicial remedies without duplicating or supplanting special procedures or specific remedies provided elsewhere. *Abbott*, 387 U.S. at 140. As the Court stated,

> To preclude judicial review under [the APA] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

Id. at 140 n. 2 (quotations and citations omitted). *NWF* also made clear that a special review statute is not required for judicial review under the APA, by noting that review under the APA has "two separate requirements," that is, that the claimant identify some final agency action that affects him, and show that he "is adversely affected or aggrieved by that action." 497 U.S. at 882 (quotation and citations omitted).

The interpretation urged by the United States would so restrict the broad review provisions of the APA as to make them meaningless. Such an outcome is particularly egregious where, as here, the rules that the United States seeks to shield from review are designed to restrict public access to information

and public participation in federal agency decision-making, as provided by Congress.

C. A Cause of Action Challenging an Application of a Final Agency Rule Is Not Required to Demonstrate Actual Harm or Otherwise Qualify for Facial Review Under the APA

Alternatively, the United States argues that once the Forest Service withdrew its decision approving the Burnt Ridge timber sale and settled all claims relating to that project, Respondents' facial challenge to the rules became nonjusticiable. Pet. Br. 36. But the Court has never held that a plaintiff must maintain a cause of action against a particular application of a rule in order to demonstrate concrete harm sufficient to challenge the validity of a final agency rule. If this were so, the United States could perpetually foreclose review of unlawful agency regulations by withdrawing decisions applying the rules, as it did in this case after a preliminary injunction issued against the Burnt Ridge project early in the litigation. The Court's reference in *NWF* to the "case-by-case approach" as the "normal[ ] mode of operation of the courts" is not contrary. 497 U.S. at 894. As the Court explained, "we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Ibid.* (citation omitted). Thus, the relevant inquiry at all times is whether the

challenged action is "final" and whether actual harm or an immediate threat of harm has been shown.

In this case, Respondents did challenge a particular agency application to the rules – the Burnt Ridge timber sale in the Sequoia National Forest in California. Although the Forest Service's later withdrawal of its approval of the sale prompted settlement of those claims, the agency's application of the rules to the Burnt Ridge project illustrate how the rules operate to deprive Respondents of the ARA's procedural means to protect their interests in forest areas that they use regularly. Evidence in the record reflecting the procedural and concrete harm Respondents suffered in relation to the Burnt Ridge Project, J.A. 17-20, together with evidence that the rules barred Respondents from commenting upon or appealing a number of timber sales in the Allegheny National Forest, an area Respondents visit routinely, Pet. App. 69a-71a, show how application of the rules divests Respondents of statutorily provided avenues for protecting the national forests that they personally use and enjoy.

The United States further suggests that § 704 of the APA, in providing for review of "final agency action for which there is no other adequate remedy in a court" is meant to preclude that facial review of a final agency rule whenever an as-applied challenge to a particular application of the rule is available in the future. Pet. Br. 19-21.

This restrictive interpretation of § 704 finds no support in the Court's extensive analysis of this clause in *Bowen v. Massachusetts*, 487 U.S. 879, 901-905 (1988). Examining the legislative history of this clause, the Court in *Bowen* concluded that Congress intended it as a exception to the otherwise broad grant of judicial review in the APA, to avoid duplication of "previously established special statutory procedures relating to specific agencies," 487 U.S. at 903, and assure that the APA "does not provide *additional* judicial remedies in situations where the Congress has provided special and adequate review procedures." *Ibid.* (emphasis added). The exception "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Ibid*.

The United States had argued in *Bowen* that § 704 should be construed to bar review in the District Court, because monetary relief was available to the state plaintiff in the federal Claims Court under the Tucker Act. The Court responded that such a "restrictive interpretation of § 704 would unquestionably . . . run counter to § 10 and § 12 of the [APA]. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes." *Id.* at 904 (quotation and citation omitted). The Court rejected the "unprecedented interpretation of § 704" advocated by the United States, "because the remedy available to the State in the Claims Court is plainly not the kind of 'special and adequate review procedure' that will oust a district court of its normal

jurisdiction under the APA." *Ibid*. The *Bowen* Court's view of § 704 cannot be squared with the United States' present claim that facial review of an agency rule is not available now because an as-applied challenge may be available in the future.

Not even the *Bowen* dissent supports the United States' theory. The *Bowen* dissent differed from the majority primarily because it interpreted the term "adequate remedy" to mean monetary relief only, and it believed that relief was fully available in the Claims Court. *Id.* at 925-926. But the dissent agreed that, "where no special review statute exists, the vast majority of specific-relief suits challenging agency action will reach district court because they are unaffected by the 'other adequate remedy' provision of § 704, since they challenge the application of statutes or regulations that cannot be regarded as providing for damages." *Id.* at 926 n. 4 (citation omitted). Although the dissent would have reached a different outcome in *Bowen*, it agreed with the majority that "adequate remedy" does not mean just *some other* remedy, but the specific relief sought through the APA. The United States would have this Court hold that relief from an individual application of a final agency rule is an "adequate" remedy even when a plaintiff shows that he is aggrieved by the implementation of the rule itself. The Court has not endorsed this view.

II. The Rule Are Ripe for Judicial Review Because They Have Caused Actual Harm, Are Otherwise Fit for Review, and Continued Application of the Rules Would Produce Hardship

The ripeness doctrine is designed to "prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies," and to protect federal agencies from premature judicial interference. *Abbott*, 387 U.S. at 148. For an agency action to be ripe for judicial review, it must be shown initially that the action "has been formalized and its effects felt in a concrete way by the challenging parties." *Id*. at 149. The Court then evaluates the fitness of the issues presented for judicial decision and the hardship to the parties of withholding review. *Abbott*, 387 U.S. at 149; *see also Reno*, 509 U.S. at 57-58; *Ohio Forestry*, 523 U.S. at 733.

The record shows that implementation of the challenged rules has restricted Respondents' ability to engage in, influence, or even be informed about Forest Service plans for resource management in national forests that they personally use and enjoy on a regular basis. Respondents, who regularly monitor, comment on and appeal Forest Service activities, can no longer do so for projects that fall within the rules. J.A. 17; Pet. App. 71a. As a result of Forest Service implementation of the challenged rules, Respondents have suffered harm not just to their interest in participating in Forest Service decision-making in the manner contemplated by the ARA, but also to their

personal interests in particular national forests that they use and enjoy. J.A. 18; Pet App. 70a-71a.

A. Concrete Effect Is Satisfied by Final Rules That Have Been Applied so as to Harm a Plaintiff's Statutory Interests

To establish concrete effect outside of the pre-enforcement context, some action by the agency or the claimants is required to cause the rules to be applied to the claimants' circumstances in a concrete way. In *National Park Hospitality Ass'n,* review was denied in part because the challenged rule had not been applied in any way that showed a concrete effect on plaintiffs. 538 U.S. at 810 ("All the regulation does is announce the position NPS will take with respect to disputes arising out of concession contracts."). It was possible that the rule might have had no effect on plaintiffs at all, because NPS did not directly administer contract disputes. *Id.* at 809, 810-811. In *Reno*, the Court declined to review rules concerning individual applications for legal status because the rules were not self-executing, and plaintiffs had not taken the steps necessary to cause the rules to be applied to their own circumstances. 509 U.S. at 58-59. The Court could not trace the alleged harm to agency application of the rules, because plaintiffs had not engaged in the process to which the rules applied. *Id*. at 59 ("promulgation of the challenged regulations did not itself give each *CSS* and *LULAC* class member a ripe claim; a class member's claim would ripen only once

he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him.").[2]

Similarly, a challenge to a forest management plan was not ripe because plaintiffs merely anticipated that an increase in clear-cutting of trees would occur under the plan. *Ohio Forestry*, 523 U.S. at 729, 733. The Court found this concern speculative and lacking in immediacy because it was possible that the plan could be modified or amended before it was ever implemented, or that no increase in clear-cutting would be approved pursuant to the plan. *Id.* at 733, 735-736. *See Toilet Goods Ass'n*, 387 U.S. at 163 (denying review of a rule merely stating that inspections "may under certain circumstances" occur, because "[a]t this juncture, we have no idea whether or when such an inspection will be ordered . . . ").

In this case, there is no question that the challenged rules have been fully implemented and their effects felt "in a concrete way by the challenging parties." *Abbott*, 387 U.S. at 148-149. The Forest Service has applied the rules to numerous project proposals,[3] and has approved some of those projects,

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[2] This case is somewhat distinct because review was available exclusively through the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255a(f)(1). *See Reno*, 509 U.S. at 54.

[3] *See* Defendant's Motion to Clarify and Amend Judgment (DE 79, July 26, 2005), p. 6, 8 (mentioning application of the rules to numerous agency projects).

including but not limited to the Burnt Ridge timber sale originally at issue in this case. J.A. 18, 20; Pet. App. 71a. There is nothing speculative about how or whether the rules apply, or how their application affects Respondents' interests. The rules, by their plain terms, systematically exclude certain types of timber sales and other resource development decisions from the public notice, comment and appeal provisions of the ARA. Application of the rules to numerous proposed activities has curtailed Respondents' ability to participate in the forest planning process for specific activities in which they are interested, diminishing their previously enjoyed access to those procedures. *See* J.A. 17, 20; Pet. App. 70a-71a. The rules have hindered Respondents' ability to obtain timely and adequate (or sometimes any) information about certain Forest Service proposals until after they are approved. J.A. 17; Pet. App. 71a-72a.

No further development of facts is required to understand how implementation of the rules has thwarted Respondents' desire and ability to engage in, influence, or become fully informed about Forest Service proposals for resource management in national forests that they use and enjoy on a regular basis. Respondents, who regularly monitor and comment on Forest Service activities, and have filed many appeals, some of them successful, can no longer do so for projects that fall within the rules. Pet. App. 71a. The rules have prevented them from appealing projects in specific instances, where they would have

done so, but for the rules. *Id.* 71a, 76a; J.A. 20. These effects will not become more concrete by additional applications of the rules, nor by requiring Respondents to present an as-applied challenge to the rules.

Final agency rules that deprive the public of notice and an opportunity to be heard, thereby limiting citizen participation in the development of public resources, where such participation has been afforded by statute, are agency action that causes cognizable and concrete harm. Without notice of proposed projects, including logging and timber sales, in the national forests that they use and enjoy in a natural state, members of the public might not even know when or if their interests in those forests are threatened by potential government action.

B. The Rules Are Fit for Review Because They Are Final, Have Been Fully Implemented, They Are Not Subject to Further Development, and the Dispute Is "Purely Legal"

The Court applies a multi-factored analysis to gauge the fitness of an agency rule for judicial review, assessing the finality of the rule, whether it is subject to further agency proceedings, the clarity of the dispute and whether it raises purely legal issues, and whether judicial review would interfere with any other proceedings that might affect or resolve the

dispute. *Abbott*, 387 U.S. at 149-151; *Ohio Forestry*, 523 U.S. at 733.

None of the factors traditionally considered by the Court in evaluating ripeness suggest that the rules challenged in this case are not fit for review. This is not an "abstract disagreement over administrative policies" that have yet to be formalized, fully developed or implemented. *Cf. Abbott,* 387 U.S. at 148. The rules are final, not informal or merely advisory. *Id*. at 151. Nor are they merely a "general statement of policy designed to inform the public of [the agency's] views." *National Park Hospitality,* 538 U.S. at 809 (quotation and citation omitted) (disputed rule merely announced one agency's interpretation of statutory provisions administered by another agency). Whether the rules violate the ARA by imposing restrictions on public notice, comment and appeal opportunities for Forest Service projects that fall within the rules, is a "purely legal" question. *Abbott*, 387 U.S. at 149. It is not subject to further agency action that could elucidate or eliminate the dispute. *Compare National Park Hospitality*, 538 U.S. at 810-811 (rule not ripe because further proceedings in another forum might clarify how rule would affect plaintiffs, if at all). In *Ohio Forestry,* further agency action was required to link plaintiffs' anticipated harm to the challenged plan. 523 U.S. at 736 (further agency action required to determine whether and where logging would occur). Here, Respondents trace the diminishment of their statutory interests under the ARA directly to the Forest Service's implementation

of the rules in particular instances, and no further agency action is necessary. Thus the dispute, as presented, lends itself to judicial resolution without further factual development.

Review of the rules now would not hinder the orderly refinement of Forest Service policies. Unlike in *Ohio Forestry*, where there was a real possibility that alterations to the challenged plan would "actually occur before the Plan is implemented," 523 U.S. at 735, the rules at issue here essentially are self-executing. They apply as the Forest Service proposes projects that fall within the rules' categorical exclusions from notice, comment and appeal. Their effects are felt immediately as the rules prevent Respondents from participating in, or even receiving full and timely information about, such proposals.

There is nothing mystifying about why the courts below concluded that the controversy remained ripe even after the Forest Service withdrew its approval of the Burnt Ridge Project. *See* Pet. Br. at 11. Nothing in the parties' subsequent settlement affected the agency's implementation of the rules themselves. Not only did it continue to be clear that the Forest Service had applied the rules to numerous projects besides Burnt Ridge, the withdrawal and settlement provided no reason to believe that the Service would not continue to apply the rules in the same manner to other projects. The record remained concrete as to how and when the rules apply and what their effects had been, and would continue to be, on Respondents.

C. Denying Review Would Cause Hardship Because the Harm Occasioned by the Rules Will Continue

Denying review would reinstate rules that have been shown to harm Respondents' interests. Respondents' interests are not limited to preventing the cutting of trees in a particular instance, but also encompass the values embodied in the ARA's notice, comment and appeal provisions: that public participation in the decisionmaking process regarding the nation's forests serves to improve the quality and public accountability of national forest management. *See* J.A. 16, 83-85; Pet. App. 68a. Respondents, who regularly monitor and comment on Forest Service activities, can no longer do so for proposed projects that fall within the rules, or even obtain full information about those project proposals until after they are already approved and implemented.

Because reinstatement of the rules would cause a continuation of demonstrated harm to Respondents' interests, as new proposals are made and approved under the rules, postponing review on prudential grounds is not justified. Notably, the United States cites no case in which the Court has denied review of final agency action that has caused actual harm, where, as here, the dispute presented is otherwise fit for review. Denying review will not allow the controversy to become more "ripe" for judicial resolution than it is now, and the public interests at stake will be served by allowing for conclusion of the controversy.

III. Respondents Maintained Standing to Facially Challenge the Rules

In another effort to foreclose review of the challenged rules, the United States argues that Respondents lost standing to facially challenge the rules when the Forest Service withdrew its approval of the Burnt Ridge Project, and the parties settled all claims related to that action. That is not the law. Respondents have suffered harm not just to their interest in participating in Forest Service decision-making in the manner contemplated by the ARA, but also tied that harm to their personal stake in particular national forest areas including, but not limited to Burnt Ridge. By doing so, Respondents established standing to maintain a facial challenge to the rules.

To satisfy the Constitution's Article III standing requirements,

> plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

A. Respondents Demonstrate Injury-in-Fact

Respondents show a concrete and particularized injury-in-fact as a result of Forest Service implementation of the rules – an injury that in turn threatens to diminish their enjoyment of particular national forests that they use and enjoy regularly.[4] The injury is neither abstract nor conjectural, because the rules have prevented Respondents from commenting upon and/or appealing projects proposed in specific national forests that they use and enjoy on an on-going basis, and they would have commented upon or appealed these projects absent the rules. Pet. App. 71a ("If these timber sales were subject to appeal, Heartwood and I would have appealed them."); J.A. 20 ("the Forest Service has denied me and other members . . . the opportunity to submit substantial comments on the [Burnt Ridge] project and has denied us the right to file an administrative appeal. If provided the legal right to file such an . . . appeal, I would have done so.").

This exclusion from what the ARA envisions as a public process threatens to lessen the aesthetic, recreational and/or ecological value of those forests to Respondents, because their views will not be heard regarding the management of public lands that they routinely use. The injury to Respondents' interests is

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[4] If a single plaintiff has standing, that is sufficient to meet the case or controversy requirement. *Mass. v. EPA*, ___ U.S. ___, ___, 127 S.Ct 1438, 1453-54 (2007).

"particularized" because it affects them in a "personal and individual way," *Defenders of Wildlife*, 504 U.S. at 561 n. 1, diminishing their previously enjoyed access to procedures that the rules now restrict. J.A. 17 ("The amended regulations . . . make it significantly more difficult for me to monitor and participate in projects that implement the Sequoia National Forest management plan."). This injury is both traceable to the challenged rules, and redressible by a decision invalidating the rules. Indeed it has been redressed by a favorable decision on the merits below – a decision not challenged in this Court.

B. Respondents' Injury Is Not Merely Procedural

Respondents' injury is not strictly procedural. Respondents' procedural interests are connected directly to their personal use, study and enjoyment of particular national forests, in which projects were proposed and/or approved without affording public opportunities for comment or appeal. *See* J.A. 20 (Sequoia N.F.); Pet. App. 68a-71a (Allegheny N.F.) Respondents wish to enjoy the forests that they use on a regular basis in a natural and undisturbed state.[5]

[5] The desire to use or observe the natural environment in its undisturbed state, "even for purely esthetic purposes is undeniably a cognizable interest for purpose of standing." *Defenders of Wildlife*, 504 U.S. at 562-63 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing the desire to enjoy the "scenery, natural and historic objects and wildlife" of a national park as a cognizable interest for standing)).

J.A. 18; Pet. App. 70a. By preventing Respondents from presenting their views regarding projects proposed for such forests, the rules create an actual and imminent risk of harm to their enjoyment of those forests. *See* J.A. 18 (the removal of trees approved in the Burnt Ridge project "will render the area less valuable to me for an extended period of time"); *id.* at 19 (as a result of approval of the Burnt Ridge Project, "the habitat necessary for the wildlife that I enjoy will not become available again for centuries"). *Cf. Mass. v. EPA*, 127 S.Ct. at 1455 ("EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.' ").

Unlike the injury claimed in *Defenders of Wildlife*, the injury here is not hypothetical or lacking in causation. In *Defenders of Wildlife*, plaintiffs claimed that their interests in observing endangered species in the wild could be impacted by the failure of federal agencies to consult with the Secretary of Interior before funding projects overseas. *Defenders of Wildlife*, 504 U.S. at 564. Plaintiffs had visited the foreign countries of concern only *once*, merely hoped to go again some day, *id.*, and the agencies whose funding decisions could affect the species plaintiffs cared about were not before the court. *Id.* at 568-69. Aside from the speculative nature of plaintiffs' ties to the allegedly affected areas in *Defenders of Wildlife*, it was not clear that challenging the rule would have any salutary effect on their interests. Here, however, due directly to implementation of the challenged

rules, Respondents could not participate in the forest planning process as they would have, or appeal Forest Service decisions that they would have appealed, regarding projects proposed in national forests that they personally use and enjoy on an ongoing basis. J.A. 17, 20; Pet. App. 70a-71a.

Nor is the impact on Respondents "undifferentiated and common to all members of the public." *Defenders of Wildlife*, 504 U.S. at 575 (quotation and citation omitted). Respondents distinguish themselves from the general public by virtue of their repeated and regular use of specific forest areas. *See id*. at 584 n. 2 (opinion of Justice Stevens, concurring in the judgment). *See also id*. at 579 (opinion of Justice Kennedy, concurring in part and concurring in the judgment).

Respondents also demonstrate a concrete stake in the outcome of Forest Service activities by showing that they would have appealed specific projects had they been able to, that they have filed hundreds of similar appeals in the past, some of which have prevailed, and that the appeals process, through the additional information they are able to obtain, is valuable to them even when not successful. Pet. App. 70a ("I have informational interests in appeal decisions from the information they provide me even when not decided in my favor, and these interests are harmed when I am not permitted to appeal a decision."). Unlike plaintiffs in *Defenders of Wildlife,* who had only once visited the areas they professed an

interest in, Respondents' personal lives are structured around their regular recreational and educational activities in, and public monitoring of government activities within, the specific national forests that they are most passionate about. *See* Pet. App. 69a-71a (describing having visited over 70 national forests, some of them hundreds of times, having commented on a thousand Forest Service projects, and planning to use national forests for recreational purposes for the rest of his life).

In sum, the Court's precedents support finding that Respondents have standing to challenge rules that bar public participation in Forest Service decision-making affecting the national forests, where those rules deprived Respondents of the opportunity to oppose specific threats to their recreational interests in particular forests that they use and enjoy.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Dated: June 27, 2008

Respectfully submitted,

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